FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00EJ/LSC/2023/0021**
Property	**:**	**22 Castle Court, Annfield Plain, Stanley County Durham DH9 7SA**
Applicant	**:**	**Michael Joseph Williamson**
Respondent	**:**	**Karbon Homes**
Type of Application	**:**	**Application under S27A Landlord and Tenant Act 1985 and Schedule 11(5)(a) Commonhold and Leasehold Reform Act 2002 for determination of Payability and reasonableness of service charges**
Tribunal	**:**	**Tribunal Judge P. J. Ellis. Tribunal Member N. Wint FRICS**
Date of Hearing	**:**	**29 April 2024**
Date of Decision	**:**	**23 May 2024**

DECISION

The Tribunal is satisfied that the costs associated with the gates are not those costs which the landlord is unable to recover by the operation of s11 Landlord and Tenant Act 1985. The costs are a service which the landlord has agreed to provide. The tenancy agreement properly construed has not excluded the landlord from claiming those costs as part of the service charge account.

The Applicant is not liable to pay any of the Respondent's costs of this application, The Tribunal orders, under section 20C Landlord and Tenant Act 1987 that Karbon Homes may not include costs it has incurred in this appeal in any service charge payable by Mr Williamson, and an order under paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 that any liability on Mr Williamson's part to pay any administration charge in respect of the costs of the appeal is extinguished.

Introduction

1. The Tribunal received an application for a determination as to whether the service charge in respect of the above property is payable and/or reasonable. The application concerns the service charge years 2017-2024. An application has also been received for an order reducing or extinguishing the Applicant's liability to pay a particular administration charge in respect of costs incurred in connection with these proceedings.

2. The issue between the parties relates to whether or not any charges incurred by the Respondent relating to electric gates situated at the entrance to the estate comprising Castle Court are payable by the Applicant having regard to the terms of the lease or they are payable by the Respondent from rental income.

3. The Applicant issued these proceedings on 5 July 2023. After payment of necessary fees Directions were issued on 3 November 2023 by a legal officer in the Northern Region of the First-tier Property Tribunal proposing a paper determination.

4. After representations by the Applicant the matter was listed for an oral hearing. Further directions were given when the Tribunal realised a fee paid judge of the First-tier Tribunal sitting on the Northern Region Panel had given advice in connection with the matter in his role as a solicitor. The matter was then transferred to Midland Region for determination by this Tribunal.

5. The matter was conducted on VHS platform. Mr Williamson appeared on his own behalf. Mr Jeffreys, Head of Income appeared on behalf of the Respondent.

The Property

6. The Applicant, Michael Joseph Williamson is a resident of 22 Castle Court. A description of Castle Court is taken from the statement of Mr Williamson. It is not controversial.

7. Castle Court provides sheltered accommodation for people 55 years of age and over on assured tenancy agreements. It consists of 41 apartments as part of the main building (both one and two bedroom) with 5 two-bedroom bungalows in the grounds. It is believed all properties are rented and tenants are subject to a service charge in addition to paying basic rent.

8. The property was refurbished, and the bungalows built with new and returning residents taking up residence in June 2013 when they received a Tenancy Agreement from Derwentside Homes who were the landlords at that time.

9. In February 2015 Derwentside Homes issued an altered Tenancy Agreement dated 2nd October 2014 following consultation with Tenants. In April 2017 Derwentside Homes joined with ISOS and Cestria and Karbon Homes came into being. Since that time new tenants have been issued with a new Tenancy Agreement (but the Tenancy Agreement for those tenants in place prior to April 2017 continues to apply. The main difference between the two Tenancy Agreements is that the former Derwentside Homes tenants are paying a "variable" service charge and those on a Karbon Homes agreement are on a "fixed" service charge. There appears to be approximately a 50/50 split between

the two kinds of agreements. The Agreement for the Applicant was signed on 14 April 2015.

10. The residential part of the estate is bounded by a wall and fence constructed separate and apart from the residential buildings. The boundary comprises a brick wall at the front of the estate. At the rear of the estate there is a car park access to which is by Mitchell Street. Entry to the parking area, the rear of the buildings of the estate and the recently constructed separate bungalows is through the electric gates which are the subject of this dispute.

11. Although there was no inspection by the Tribunal, members explained to the parties they had viewed images of the estate and the fence on a social media site to get a better understanding of the location off Castle Court and the fencing arrangement.

The Tenancy Agreement

12. The tenancy agreement signed by the Applicant is described as being the "*Derwentside Tenancy Agreement October 2014 Version*". The agreement records the Applicant's tenancy commenced on 27 October 2014. The rent payable was £133.64 including service charges of £37.91 made up of £31.42 service charge and £6.49 water and sewerage charges.

13. Paragraph 2 of the agreement deals with repairs for which the landlord is responsible. Paragraph 2.1 provides that the landlord will repair and keep in proper working order installations to deliver space and water heating, sanitary ware and the supply of gas and electricity.

14. Paragraph 2.2 deals with common parts as follows:

"Repair common parts by taking reasonable care to keep the common entrance halls stairways, lifts, passageways, rubbish chutes and any other common parts, including their electric lighting, in reasonable repair and fit for use by you and other occupiers of and visitors to your home."

15. Paragraph 2.3 of this agreement states:

"We will keep the structure and exterior of your home and its installations (including communal areas in the case of flats) in a good state of repair and decoration and normally decorate these areas once every 5 years. The structure and exterior includes

i) Drains gutters sewers and external pipes (except where the drains and sewers are the responsibility of a water company when defects will be reported to that company);

ii) The roof

iii) Outside walls, outside doors windowsills window catches sash cords window frames including necessary outside painting and decorating;

iv) Internal walls floors and ceilings doors and frames door hinges and skirting boards but not including internal painting and decoration;

v) Chimneys, chimney stacks and annual service of solid fuel systems and flues;

vi) Pathways, walkways, hallways, balconies, steps or other means of access

vii) External plasterwork and rendering

viii) Boundary walls gates and fences if they exist at the start of the tenancy or are later erected by us, adjoining footpaths, rights of way, garage access or any roads not maintained by the Council and owned by us; and

ix) Access paths passageways and alleys owned by us.

16. Paragraph 22.1 is the rent payment clause. It requires the tenant *"To pay the rent (which includes all of the charges referred to at the start of this tenancy agreement) when due."* It then goes on to make provisions regarding the rent day, apportionment if the tenancy commences on a non-rent day, joint tenant's responsibility, and possible entitlement to benefits which are not relevant to this case.

17. Paragraph 48.1 states tenants must "*pay your weekly rent and service charges if any apply when due".* It then goes on to remind tenants they are at risk of court action in default.

18. Paragraph 50 explains how service charges may be increased if tenants receive services by reference to preparation of written notice showing the full details based upon preparation of an estimate, calculation of actual expenses, apportionment, and adjustment if necessary for deficits or surplus from preceding years. The paragraph gives tenants the right to examine service charge accounts (50.5). The landlord may establish a sinking fund (50.8).

19. Paragraph 51 provides that the landlord may vary service charges after consultation with tenant's:

"We may, after consultation with you and all other affected tenants increase add alter vary reduce or remove any service(s) for which you pay a service charge. We will act reasonably and will take account of tenant's views and any guidance issued." It then goes on to provide for the consultation process and notice of increase or variation.

Statutory Framework

20. This case is concerned with the implied covenant of repair from s11 Landlord and Tenant Act 1985 and whether it prevents the Respondent from claiming the cost of repairs of electric gates. It relates to the principle of payability not the amount of the service charge which the Respondent claims for the maintenance of the electric gates forming the entrance to the rear of the estate. No evidence was adduced regarding the amount of the charges. The Applicant seeks a declaratory order that the lease does not permit the Respondent to impose the charge. The Tribunal's jurisdiction to make such a declaration is in the relevant sections of the Landlord and Tenant Act 1985 are ss18 and 27A.

21. The relevant sections are recorded here.

S11 Provides (1)In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor—

(a)to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),

(b)to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and

(c)to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

(1A)If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—

(a)the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and

(b)any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either—

(i)forms part of any part of a building in which the lessor has an estate or interest; or

(ii)is owned by the lessor or under his control.

(1B)Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts, as defined in section 60(1) of the Landlord and Tenant Act 1987, which the lessee, as such, is entitled to use.

(2)The covenant implied by subsection (1) ("the lessor's repairing covenant") shall not be construed as requiring the lessor—

(a)to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part,

(b)to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident, or

(c)to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house.

(3)-(6) not relevant

S60 Landlord and Tenant Act 1987 provides "common parts", in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it.

S18 provides: *(1)In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—*

(a)which is payable, directly or indirectly, for services, repairs, maintenance improvements or insurance or the landlord's costs of management, and

(b)the whole or part of which varies or may vary according to the relevant costs.

(2)The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3)For this purpose—

(a)"costs" includes overheads, and

(b)costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

And s27A provides:

(1)An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(a)the person by whom it is payable,

(b)the person to whom it is payable,

(c)the amount which is payable,

(d)the date at or by which it is payable, and

(e)the manner in which it is payable.

(2)Subsection (1) applies whether or not any payment has been made.

The Parties Submissions

The Applicant

22. Mr Williamson submitted a detailed written statement giving a history of various meetings and correspondence which had taken place between the parties concerning his contention that any charge relating to the electric gates must be met from sums paid as rent to the landlords. The tenancy agreement does not permit the costs to be added to the service charge account, but he did not dispute the obligation to pay service charges generally.

23. He also described alleged failure to consult adequately with the tenants regarding the service charges and an apparent change of policy about what services could be charged to the tenants.

24. The service charge statements were not properly itemised until the applicant with other tenants complained. After complaints both formal and informal about the Respondent's presentation of service charge claims the Applicant realised the charges included costs connected with the gates. Other charges were presented which the Applicant believed related to other properties namely Trade Waste. As there is no trade waste at Castle Court the Applicant deduced the Respondent was not properly recording costs or copying costs schedules from other properties.

25. He produced an opinion from solicitors instructed by the Respondent which advised the tenancy agreement did not make clear the tenants' liability for costs incurred in connection with the gates.

26. Although the Applicant had prepared a careful and detailed description of the exchanges between the parties on the issue, he was able to make a succinct summary of the issue for the Tribunal. He believes that any reasonable person reading Paragraph 2.3 of the Tenancy Agreement which falls under the heading of "*Landlord Responsibility and Rights*" would interpret that to mean that the landlord was accepting responsibility to pay for these matters i.e. pay from Rent as opposed to an additional cost or Service Charge. He referred to

correspondence with Kathryn Parkin the Rents, Estate Services and Service Charge Team of the Respondent of 22 May 2022. In that letter Ms Parkin asserted the cost of repair and maintenance of the gates "sit outside "s11 repairing obligations. He regarded the Respondent's arguments that repairs to the gates fell outside the effect of s11 fallacious because of the literal meaning of the words of cl 2.3.

27. The letter of 22 May 2022 acknowledged the tenancy agreement does not provide a list of services to be paid for but asserts they are provided in a Schedule or Appendix and enclosed a copy of the Schedule for 2013/14. The Schedule referred to maintenance of the electric gates, and later Schedules referred to Grounds and Gardens costs. Mr Williamson denied receiving the Schedule and produced a short statement signed by other tenants who stated they had not received such a Schedule.

28. In answer to questions from the Tribunal Mr Williamson stated there are some garden gates to the ground floor flats. There is a means of pedestrian access to the building from Station Road.

29. The issue is important because the Respondent is proposing a substantial refurbishment or replacement of the gates with a consequent risk of increase of the service charge claim.

The Respondent

30. Mr Jeffreys, the Income Manager of the Respondent, agreed the issue concerned the meaning of clause 2.3 of the tenancy agreement and the liability for the cost of repair and maintenance of the electric gates at the entrance to the estate. Statutory duties deriving from s11 and s11(1) A Landlord and Tenant Act 1985 and the tenancy agreement outline repairing obligations on the Respondent. Karbon is required to keep in good repair items ranging from bathroom fittings to the gates forming part of the boundary to Castle Court. He referred the Tribunal to his letter of 16 June 2022 (p130 Bundle) which sets out the Respondent's position.

31. The subject gates formed part of Castle Court at the time of the tenancy. They had been installed at the time of the refurbishment of the entire estate. He accepted that the list of services provided by the landlord may not have expressly referred to the gates at the outset of the tenancies following refurbishment.

32. There had been some repayments to tenants following removal of some items from the claim for service charges, but the gates were always included in the Respondent's calculations. Items removed from charges included roof repairs and attention to the exterior of the building which he agreed were the landlord's responsibility being part of the structure of the building.

33. In service charge year 2018/9 the description of the service charge items improved so that customers are aware of the charges they are expected to pay. Mr Jeffreys stated tenants made no complaints about the charges which were given in both estimates and actuals. The Respondent produced a letter of April 2022 from Lisal Gray an RES officer of the Respondent which attached a statement of expenses showing costs for the gates. Lisal Gray's letter states the same information was provided in years 2018/9, 2019/20 and 202/21. The Respondent's bundle also included service charge schedules for the years from 2017/8 to 2023/4 as well as management statements actual and estimates.

34. The gates are now approaching the end of their useful life. A s20 consultation in connection with their replacement is underway. He expressed the hope that the parties could reach an agreement over the consultation.

35. The legal advice referred to by the Applicant was obtained in 2017. It related to costs which should not be included in the service charge claim and was not specific to the gates.

36. Mr Jeffreys referred the Tribunal to *Edwards v Kurmarasamy [2016]UKSC 40* and *Anchor Hanover Group v Cox [2023] UKUT 14 (LC)* in support of his contention that repair and maintenance of the gates is within the scope of the repairing obligation of the Respondent on both a true construction of the tenancy agreement as well as in discharge of its statutory obligations because

the gates are part of the boundary of the estate and they control access to the estate.

Discussion

37. The issue for the Tribunal is whether the effect of s11 of the Act prevents a landlord from recovering service charge contributions towards the costs associated with electric gates, their repair maintenance and eventual replacement in service charge accounts payable by the tenants.

38. The Applicant seeks a declaration of their payability for service charge years 2017 to date and continuing. There has been uncertainty over the inclusion of such costs until 2018/9 because of the way in which service charge items were presented by the Respondent or their predecessors. The Applicant alleges the Respondent has changed its position in relation to the payability of such costs. The Respondent denies any such inconsistency. The Tribunal finds there has been a historic lack of clarity in presentation of service charge estimates and accounts but that does not resolve the issue.

39. The Applicant contends that the words of paragraph 2.3 of the agreement have a clear meaning that the landlord has taken on responsibility for the repair of the gates from rent payments.

40. In *Anchor* the Upper Tribunal said "the structure of section 11 seems to me to be clear, and to apply the landlord's obligation, so far as its concerns installations, only to installations of the sort described in subsection (1)(b). Lord Neuberger's warning that one should not be too ready to give an unnaturally wide meaning to the implied terms imposed by section 11 applies just as much to lifts within the building as it does to cracked paving stones outside it."

41. That case concerned a lift in *"a sheltered housing scheme, Mr Cox explained that many of the tenants are elderly or infirmed and have to use wheelchairs, walking stick or Zimmer frames. A properly functioning lift serving all floors of the building is an essential facility which many tenants rely on and without*

which they would be unable to continue living in their flats" and the tenancy agreement provide for *"repairing the structure and outside of the premises (paragraph 3), maintaining and repairing installations for supplying heating, water, gas and electricity (paragraph 4), and repairing and maintaining any communal (shared) areas (paragraph 5). Although the lift is not specifically mentioned it is agreed that it falls within paragraph 5."*

42. The Upper Tribunal held the lift was not an installation which fell within subsection (1)(b) or (c) as extended by subsection (1A)(b).

43. The gates are provided as a means of controlling access to the estate. They are not "*structure and exterior of your home and its installations (including communal areas in the case of flats) in a good state of repair and decoration"*. Accordingly, the Tribunal is satisfied that the Respondent is not prevented from charging for the services relating to the gates by s11.

44. The consequential issue is whether the Respondent has nevertheless assumed responsibility for the repairs to the gate by the terms of its tenancy agreement. The gates form part of the "*Boundary walls gates and fences"* and were erected at the start of the tenancy.

45. The service charges recorded in the schedules showed charges for Gardens and Grounds in years 2017/8, 2018/9 and 2019/20 which included costs associated with the gates. For the following years the charges associated with the gates and ground maintenance were stated separately. There are no charges which could be described as anything falling within cl 2.3 apart from the gates but there no charges relating to boundary walls or fences. Moreover, the gates do not form part of the structure or exterior of the building.

Conclusion and Decision

46. The Tribunal is satisfied that the costs associated with the gates are not those costs which the landlord is unable to recover by the operation of s111 Landlord and Tenant Act 1985. The costs are a service which the landlord has agreed to

provide. The tenancy agreement properly construed has not excluded the landlord from claiming those costs as part of the service charge account.

47. It was not unreasonable of Mr Williamson to bring this matter to the Tribunal for its determination. Accordingly, he is not liable to pay any of the Respondent's costs of this application. The Tribunal makes an order under section 20C, Landlord and Tenant Act 1987, that Karbon Homes may not include costs it has incurred in this appeal in any service charge payable by Mr Williamson and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that any liability on Mr Williamson's part to pay any administration charge in respect of the costs of the appeal is extinguished.

Appeal

48. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Judge P.J Ellis